

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.593 OF 2004

Gulam Sabir Qureshi

...Appellant

Vs.

MHADA & Another

...Respondents

CORAM: A.S.OKA, J.

DATED: AUGUST 11, 2004.

P.C.:

1. By order dated 28th July 2004 it was made clear that the First Appeal may be decided finally at admission stage. As there was dispute between the parties as regards status of repairs/reconstruction, I had directed the parties to file Affidavit in that behalf.

2. I have heard the Counsel appearing for the parties. The Appellant is the original Plaintiff. While deciding the Notice of Motion for temporary injunction taken out by the Appellant, the Trial Court has dismissed the suit on the ground that the same is not maintainable as the provisions of Section 173 of MHADA Act are not complied with.

3. The learned Counsel appearing for the Appellant submitted that issue of maintainability of the suit should not have been decided while deciding the Notice of Motion taken out by

the Appellant for interim relief. He submitted that the written statement was not filed by the Respondents-Defendants and therefore there was no question of framing issue as regards maintainability. He submitted that the impugned Judgment and Order deserves to be set aside and the suit should be remanded to the Trial Court for hearing. He submitted that as repairs/reconstruction of the building in question is not at all completed, it is necessary to direct the Respondents to maintain status quo till the disposal of the suit.

4. Shri Tated learned Counsel for the Respondent submitted that admittedly there is non-compliance of the provisions of Section 173 of MHADA Act and the Court below was right in holding that the suit was not maintainable. He submitted that even during the course of hearing before the Trial Court it was pointed out that 90% of the work has been completed by the Respondents and therefore order of status quo cannot be granted.

5. I have considered the rival submissions. Order of dismissal has been passed by the Trial Court while deciding the Notice of Motion No.4987 of 2002. The Notice of Motion was taken out by the Appellant-Plaintiff for temporary injunction. A reply was filed to the said Notice of Motion. In the reply one of the contentions raised was regarding non-maintainability of the suit on account of the failure of

the Plaintiff to serve the notice under Section 173 of MHADA Act. Perusal of the impugned order shows that the learned Trial Judge came to the conclusion that there is non-compliance with the requirement Section 173 of MHADA Act as the notice contemplated by the said provision was not served by the Appellant on the Respondents before filing the suit. It is obvious that before Notice of Motion was heard preliminary issue as regards maintainability of the suit was not framed. There was no occasion to frame such issue as the written statement was not filed by the Respondents. The learned Trial Judge has observed that he was required to frame issue as regards maintainability and he has heard the Advocates appearing for the parties on the point of maintainability as both the Advocates did not desire to lead evidence.

6. What was before the Trial Judge was only Notice of Motion for temporary injunction. If the main contention raised by the Respondents was that the Court had no jurisdiction to hear and decide the suit, in such a case Section 9(A) of the Code of Civil Procedure, 1908 mandates that either before deciding the Notice of Motion for injunction or at the time of deciding the Motion the objection regarding jurisdiction shall be decided. In the present suit the objection was as regards maintainability of the suit as distinguished from the objection of lack of jurisdiction. The objection was that there was failure to issue statutory notice under Section 173

of MHADA Act. Thus, the objection was clearly on the point of non-maintainability of the suit as distinguished from the objection regarding jurisdiction of the Court to entertain and try the suit. Therefore, Section 9-A could not have been invoked and issue regarding maintainability could not have been framed. It appears that issue of maintainability was framed during the course of dictation of the order on Notice of Motion, In the Plaint an averment has been made that notice under Section 173 of the Act was given to the Respondents. Therefore, the course adopted by the learned Trial Judge of framing issue of maintainability while disposing of the Notice of Motion for interim relief was not proper. The Appeal, therefore, deserves to be allowed and only on this ground the impugned order deserves to be quashed and set aside.

7. There is a serious dispute as regards status to repairs/reconstruction of the building. The dispute as regards the status of the re-construction/repair can be resolved only by the Trial Court. The Trial Court will also have to examine the merits of the case. Therefore, no interim order can be passed in this First Appeal. If the Appellant is desirous of claiming any interim relief, it is for him to take out proper Notice of Motion in the suit and establish his right to claim such relief.

8. Hence, I pass the following order :

i) The impugned Judgment and order dated 2nd July 2003 in so far as it relates to the dismissal of the suit filed by the Appellant is quashed and set aside and the suit is restored to file.

ii) It will be open for the Respondents to raise the contention as regards non-maintainability of the suit on the basis of non-compliance of Section 173 of MHADA Act by filing the written statement.

iii) The order passed on Notice of Motion No.4987 of 2002 is confirmed. However, notwithstanding the confirmation of the said order, it will be open for the Appellant to take out proper Notice of Motion for claiming interim relief. The Trial Court will consider the said Notice of Motion on its own merit after giving opportunity to the Respondents of being heard.

iv) All questions on merit are kept open.

v) Parties are directed to appear before the Trial Judge on 30th August 2004 at 11.00 a.m.

vi) Parties and the Trial court to act upon an ordinary copy of the order duly authenticated by the Court Sheristedar.

Judge.